

OGC Has Reviewed

L. R. Houston

9 November 1948

STATINTL

"De facto" Employment of [REDACTED] Mess Attendant.

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1. In accordance with your verbal request, I have examined the possibility of treating the mess attendant at [REDACTED] as a de facto employee for the period he was carried on the Agency's payroll.

2. The Comptroller (3 Comp. Gen. 10 12) has stated the general rule that:

"Service rendered as a de facto officer can not form the basis of any legal claim against the Government for compensation, therefore, but compensation already paid for services rendered as a de facto officer may be retained if not in excess of the reasonable value thereof."

In the situation presented a person holding a position as register and receiver of a U. S. land office was considered ineligible to also hold the office of commissioner. This prohibition resulted from the specific statutory provision ("dual compensation" not applicable), but the employee was held a de facto officer for the period actually employed in the latter job. In opinion B-42222, dated June 9/44, a statutory prohibition of the employment of aliens not only prevented the payment of salary but also the retention of any portion improperly paid--regardless of whether the officer was de facto or de jure. And, in 15 Comp. Gen. 587, the Comptroller stated that a person fraudulently obtaining employment could at most be regarded only as a de facto employee, although the question of refunding salary payments was not raised. There are also numerous opinions involving retention beyond retirement age, appointment after retirement, and holdover beyond expiration of appointment period, in which the general rule was restated. (See 3 Comp. Gen. 823; 8 id. 73; 10 id. 554; 12 id. 754; and 22 id. 300.) Work prior to acceptance of appointment or reporting for duty has on two occasions classified the employee as either de facto or volunteer (8 Comp. Gen. 369; 18 id. 81). In all of the situations reviewed above, however, the objectionable defect has lain in the individual's personal eligibility for the office.

He has failed to qualify as a de jure officer because he was prohibited by either a statutory provision or a rule of policy. But, in each case, a de jure office existed. Where such a de jure office does not exist, then there can be neither a de jure nor de facto officer. This was clearly presented by the Comptroller in 3 Comp. Gen. 647. In that case, a member of the Marine Corps was denied the right to compensation for mail clerk in an American legation in China when the office had not been established in accordance with law.

3. In the instant case, the mess was established for the convenience of a minority group of individuals. If a Government mess was not authorized, then the inclusion of a messman in the T.O. appears to be illegal per se and the office did not exist de jure. Therefore, the Government's claim against the recipient for refund of the amount of pay already received appears to be proper.

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APPROVED:

EXEC FOR A & M